IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 568

INTERNATIO-ROTTERDAM, INC.,

Petitioner,

—against—

RIVER BRAND RICE MILLS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FRANK MARCELLINO,
Attorney for Petitioner,
55 Liberty Street,
New York City.

PETER J. KOOIMAN,
Of Counsel.

THE COURT PRESS, 130 Cedar Street, N. Y. C.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	2
Reasons for Granting the Writ	4
POINT I—The buyer's (excusable and trifling) delay in taking delivery when the seller is ready to deliver does not discharge, instantly and finally, the seller from his contractual duty; and, therefore, the giving of shipping instructions in sufficient time to allow the seller to effect delivery within the stipulated time therefor is not, typically, or in the circumstances of the present case, a "condition" of the seller's duty to deliver the goods	6
POINT II—Respondent's deliveries to Lake Charles after the purported cancellation "with respect to the 45,600 pockets which had been intended under (its) option" for delivery at Houston, constituted an election to reaffirm respondent's total obligation under the contract	16
Conclusion	19
Opinion of District Court	A1
Opinion of Court of Appeals	A27
Judgment of Court of Appeals	A35
Judgment of District Court	A37

Table of Cases Cited

PAGE

Bowes v. *Shand* (1879), 2 App. Cas. 455 ..... 5, 10, 13

Fortson Grocery Co. v. *Pritchard Rice Milling Co.*, 220 S. W. 1116 13

Helgar Corp. v. *Warner*, 222 N. Y. 449 ..... 11, 12

Jacksboro Stone Co. v. *Fairbanks Co.*, 107 S. W. 567 13

LeRoy Dyal Co. v. *Allen* (C. C. A. 4), 161 F. 2d 152 ..... 11, 16

Malko M. & L. Co., In re, 32 F. 2d 825 18

Martindale v. *Smith*, 1 Q. B. 389 12

Mersey Steel & Iron Co. v. *Naylor* (1884), 9 App. Cas. 434 ..... 12, 13

National Commodity Corp v. *American Fruit Growers*, 45 Del. 169 14

National Machine Co. v. *Standard Shoe Machinery Co.*, 181 Mass. 275 12

Newark S. C. Co. v. *N. Y. Credit Men's Adj. B.*, 186 F. 2d 152 (C. A. 2) 18

Norrington v. *Wright* (1885), 115 U. S. 188. 5, 6, 10, 11, 17, 19

Reuter v. *Sala*, 4 C. P. D. 239 (discussed, 115 U. S. pp. 209-210) 17

Richard v. *Am. Union Bank*, 253 N. Y. 166 11

Schuldir v. *Ladew*, 178 App. Div. 458, 165 N. Y. Supp. 504 18

Simms-Wylie Co. v. *City of Ranger*, 224 S. W. 2d 265 ..... 17, 18

United Irrigation Co. v. *Carson Petroleum Co.*, 283 S. W. 692 14

Other Authorities Cited

	PAGE
28 U. S. Code:	
Section 1254	2
Section 1332	4
Pollock on Contracts (10th ed.), p. 257	8
Williston on Sales:	
Section 767e, at pp. 779-780	9
Section 507a, at p. 105	15
Section 577, at pp. 221-222	15
Section 755	18
English Sale of Goods Act:	
Section 28	9
Section 10(1)	11, 12
Uniform Sales Act:	
Section 42	9
Section 51	13
Section 45	18, 19
Chalmers' Sale of Goods Act, 1893 (12th ed., 1945), p. 44	12
Williston on Contracts:	
Section 860	16
Section 861	16
Section 683	18
Section 684	18
Section 687	18
Section 688	18
Restatement of Contracts, sec. 309	18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.

INTERNATIO-ROTTERDAM, INC.,
Petitioner,

—against—

RIVER BRAND RICE MILLS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Internatio-Rotterdam, Inc. prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on September 30, 1958, affirming the judgment of the District Court of the United States for the Southern District of New York (Walsh, D.J.).

Opinions Below

The opinions of the District Court and of the Court of Appeals for the Second Circuit are not reported. Both opinions are printed herein.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254. The judgment of the Court of Appeals was made and entered on September 12, 1958.

Questions Presented

1. Did the delay of the shipping instructions relieve the seller of any further duty to deliver the rice?

2. Did the shipments to Lake Charles after the purported cancellation of the contract with respect to the quantity which the seller intended to deliver to Houston, constitute an election to reaffirm its total obligation under the contract?

Statement of the Case

On July 30, 1952, petitioner agreed to buy from respondent 95,600 pockets of milled rice, at $8.25 per pocket F. A. S. Lake Charles, La., and/or Houston, Texas—"Shipment: December, 1952, with two weeks call from buyer." Payment: "by confirmed irrevocable letter of credit to be opened immediately payable against: 1. Dock receipt. * * *"

On August 15 a letter of credit was opened in the amount of $788,700.—the total agreed price. The letter of credit called for "Delivery during December 1952 to Lake Charles, La. and/or Houston, Texas. Insurance to be effected by buyers." It permitted payment "for partial shipments."

On September 11, 1952, petitioner, which meanwhile had agreed to sell the rice to a Japanese concern on f.o.b. terms, was unexpectedly confronted with United States export restrictions; and thus found itself in a position where it could not require the Japanese purchaser to provide a ship until petitioner produced an export license; while vis-à-vis respondent petitioner could not demand a dock receipt without naming a ship.

The Court of Appeals—unlike the District Judge—did not tax petitioner with any lack of diligence in obtaining dock space in Houston; so that there is no need to describe petitioner's efforts to give respondent shipping instructions by December 17—two weeks before the end of December, 1952. Respondent's own senior officers among themselves on December 17 and 18, 1952, referred to petitioner's default as "properly" attributable to "the regulations recently established by our government", and as "a very technical point * * * a question of a little give and take"; and respondent's vice-president in charge at Houston testified that neither he, nor, so far as he knew, any other officer of respondent's, ever expressed any concern about "going to be paid for this cargo." Petitioner concedes (as it has done from the beginning) that it was late (by a fraction of a day) with its instructions.

In the meantime, the market price of the rice had risen from $8.25 to $9.75 per pocket. When petitioner's forwarding agents at Houston did not have a dock by 8:35 a.m. on December 18, respondent cancelled the contract "with respect to the 45,600 pockets which had been intended under our option to (*sic*)

delivery at Houston," because of petitioner's "failure to give required two weeks shipping instructions with respect to (such) portion". Respondent thereafter repeatedly expressed to petitioner its determination to stand on its cancellation of the contract—though it offered to deliver the rice, during December, to Houston, at an increased price.

Notwithstanding its purported cancellation with respect to the part which respondent had "intended under our option" to deliver at Houston, respondent, from December 19th through December 30th, made further shipments to Lake Charles, and received payment therefor under the letter of credit.

Petitioner is a New York Corporation. Respondent is a Delaware Corporation. The matter in controversy exceeds Three Thousand Dollars. The basis for federal jurisdiction in the District Court is 28 U. S. Code, Section 1332.

Reasons for Granting the Writ

Certiorari should be granted because the Court of Appeals has decided important questions of state law —here: of Common Law—in a way in conflict with applicable state law, and with decisions of other federal courts; and in order to settle these important questions of commercial law, which have become further *un*-settled by the decision herein of the Court of Appeals.

It is common ground between the parties—and both Courts below—that the applicable state law is the law of Texas, a common law state.

The quantitative interest of the questions presented seems too evident to warrant elaboration. Suffice it to state that they concern, proximately, the effect of delay in performance of the principal contractual duty of the buyer, particularly in overseas commerce. While the first and principal question has long since been completely set at rest in England, this cannot apparently be predicated of this country; though the true principles applicable, we submit, are readily deducible from several leading American decisions. (See below.) Specifically, these questions involve the conditions of delay in which the seller may declare the contract at an end; and, further, the degree of consistency—of not "eating one's cake and having it too"—which the law will require of a seller asserting the right to refuse to go on with the contract.

While the effect of delay in the *shipment* of goods in overseas commerce was deliberately and clearly settled many years ago by *Bowes* v. *Shand* (1879), 2 App. Cas. 455, and by this Court's decision in *Norrington* v. *Wright* (1885), 115 U. S. 188, equally explicit decisions do not exist in the United States on the converse question as to the effect of delay in *taking delivery of* and *paying for* the goods. Even a cursory examination of the opinions in the above-cited cases cannot fail to demonstrate the great importance which the supreme tribunals of both countries attached to the question before them; and no reason is apparent why similar interest should not be inherent in the question here presented—unless, indeed, this Court should consider that it has been satisfactorily answered by the Court of Appeals. In our submission, the Court of Appeals' decision is quite inconsistent with sound principle and with au-

thority of the most satisfactory kind. Indeed, such decision cannot but cause confusion worse confounded in an area which already had great need of clarification.

We shall not apologize for citing a number of English decisions, in view of this Court's admonition that "a diversity in the law, as administered on the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts of this kind, is greatly to be deprecated". (*Norrington* v. *Wright*, *supra*, at p. 206.)

POINT I

The buyer's (excusable and trifling) delay in taking delivery when the seller is ready to deliver does not discharge, instantly and finally, the seller from his contractual duty; and, therefore, the giving of shipping instructions in sufficient time to allow the seller to effect delivery within the stipulated time therefor is not, typically, or in the circumstances of the present case, a "condition" of the seller's duty to deliver the goods.

Neither petitioner's "candid concession"—resulting in a "considerably reduced * * * area of contest" (Opinion, p. App. 29)—nor upwards of 8 months' consideration, has saved the Court of Appeals from an accumulation of appalling aberrations, including, it would seem, failure to discern clearly the precise import of the question itself. Petitioner, we submit, cannot be blamed for the Court's confusing punctuality in *shipment* with punctuality in *taking delivery*

(Opinion, p. App. 30)—as if a difference in quality between the seller's and the buyer's main duties were *a priori* inconceivable. Petitioner's argument in the Court of Appeals opened with this statement: "The principal question of law in the case is, whether failure on the part of the buyer to advise the seller, within the stipulated (calendar) period, of the place where the buyer desires him to make delivery, instantly and finally discharges the seller's obligation under the contract"—followed by the concession, that petitioner "had a duty to instruct appellee by December 17, 1952 as to the place to which it desired appellee to ship—at both ports, and that, being late with its instructions in this respect, appellant could not have demanded delivery (at either port) until sometime after December 31, 1952."

Petitioner thus having admitted its *breach* of the contract, how could the Court (Opinion, p. App. 31) "understand the appellant to contend (that it) *could perform* the condition by giving notice later in December" (italics ours)? May not a man contend that his offense does not deserve the death penalty, without asserting a *right* to commit the deed? Petitioner has at all times conceded respondent's right to *damages* (if any) caused by the delay of the shipping instructions.

It may help the discussion if Question 1 is here re-stated in the alternative terms in which similar questions commonly occur:

> Is acceptance of and payment for the goods at the exact time when the seller is obligated to deliver, of the essence of the buyer's obligation—that is to say, a (true) condition of the seller's duty to deliver the goods?

At the root of the lower Courts' errors lies failure to perceive clearly the difference between contractual terms (including such as refer to the *time* of performance) which are merely "material" (covering the entire range from "trivial" to "important"), and those which are variously characterized as "going to the root of the contract"; "vital"; "of the essense" of the one or the other party's obligation; and which, for that reason, are often called "conditions", or (less accurately) "conditions precedent"—the non-performance of which *extinguishes*, instantly and *per se*, the other party's contractual duty.

Equally pernicious, and no less astounding, is the lower Courts' confusion between "time", as *calendar* date or period, and the mere sequence (including simultaneousness—"concurrence") of performance—called by *Pollock on Contracts* (10th ed., p. 257) "the order and mutuality of performance". Where time is (truly) of the essence, unpunctuality instantly and totally discharges the other party. Non-fulfilment of the other—relative—kind of "condition precedent" at the outset *merely defers* the other party's correlative obligation.

While the Court of Appeals appears to have been vaguely aware of this—"Obviously the appellee *could not* deliver * * * *until* the appellant identified its ship and its location" (Opinion, p. App. 30—italics ours)—it failed to draw the only proper inference, viz., that respondent's *immediate, present* "duty to ship was conditioned on the receipt of the notice." (The Court's references to *Corbin on Contracts* show that the author there has in mind only those "conditions precedent" which *precede (defer)*, but do not instantly *destroy*, the aggrieved party's reciprocal

obligation.) The matter is very clearly put in *Williston on Sales*, Sec. 467e, at pp. 779-780:

> "* * * the mere fact that by the terms of the contract one performance is to precede the other makes the latter obligation conditional on the performance of the earlier obligation. It is quite another proposition, however, to assert that because the earlier obligation was not performed on time, the latter obligation is excused altogether. This is to assert that not simply performance, but the exact time of performance of the earlier obligation is a condition precedent."

Of interest in this context are the identical provisions of sec. 28 of the *English Sale of Goods Act* and sec. 42 of the *Uniform Sales Act*, declaring "delivery of the goods and payment of the price" to be "concurrent conditions"—

> "*that is to say*, the seller must be ready and willing to give possession of the goods to the buyer *in exchange for* the price and the buyer must be ready and willing to pay the price *in exchange for* possession of the goods." (Italics ours.)

The same confusion is apparent at p. App. 31 of the Court of Appeals Opinion—where the answer to our question is said to depend upon whether "the contract properly interpreted made *shipment* in December of the essence" (italics ours). The time of "shipment", at least in overseas commerce, may well be—normally is—of the essence. But it does not follow that the time of *payment* and *acceptance* must likewise be of the essence. As will be shown

presently, the seller's and the buyer's duties under the contract are not of the same quality. Furthermore, while the time of *delivery* ordinarily is expressed in such contracts—for the *buyer's* benefit—the time of *payment*, except in sales on credit, ordinarily is left to inference. This Court in *Norrington* v. *Wright*, 115 U. S. 188, at p. 210, specifically pointed out this difference.

The true reason why the time of shipment is of the essence, is plainly stated in the opening paragraph of this Court's opinion in the *Norrington* case (at p. 203), viz.: its being "descriptive of the subject-matter." The passages quoted by this Court (at p. 209) from the opinions in *Bowes* v. *Shand*, *supra*, put the matter with similar force:

> "The parties have chosen * * * to say: We bargain to take rice, shipped in this particular region, at that particular time, on board that particular ship; and before the defendants can be compelled to take anything in fulfillment of that contract it must be shown not merely that it is equally good, but that it is the same article as they have bargained for—otherwise they are not bound to take it" (per Lord Blackburn, *ubi supra*).

Contrast with this:

> "General statements abound at law, that time is always of the essence (* * * *Norrington* v. *Wright*, 115 U. S. 188; * * *) For some purposes this is still true. The vendor who fails to receive payment of an installment the very day that it is due, may sue at once for the price.

But it does not follow that he may be equally precipitate in his election to declare the contract at an end. That depends upon the question whether the default is so substantial and important as in truth and in fairness to defeat the essential purpose of the parties" (per Cardozo, J. in *Helgar Corp.* v. *Warner*, 222 N. Y. 449, at pp. 453-4).

In *Leroy Dyal Co.* v. *Allen* (C. C. A. 4), 161 F. 2d 152, the Court declined to treat the time specified in the contract as of the essence either as to the inspection or shipment of the goods—discarding the "strict view" taken in such cases as *Norrington* v. *Wright*, in favor of its "amelioration", which disposes the court, in the absence of an express stipulation making time of the essence, not to treat it so (*Ibid.*, pp. 154-5).

We respectfully concur in the "strict" rule—within the limits specifically laid down by this Court in *Norrington* v. *Wright*. The soundness of the distinction, there pointed out by this Court, between delay in the delivery of goods and delay in the payment of the price, is readily perceived if the true reason of the rule making the time of delivery of the essence, is kept in mind. Payment, in the "medium of exchange" (*Richard* v. *Am. Union Bank*, 253 N. Y. 166, at p. 174) will be "the same article * * * bargained for" tomorrow that it is today.

Whatever the reason, the settled common law rule is, that the time of payment—and, therefore, of acceptance—is not, normally, deemed to be of the essence. The rule is so stated in Sec. 10(1) of the

*English Sale of Goods Act** —on the authority of *Martindale* v. *Smith*, 1 Q. B. 389, and *Mersey Steel & Iron Co.* v. *Naylor* (1884), 9 App. Cas. 434: see *Chalmers' Sale of Goods Act, 1893* (12th ed., 1945), p. 44. To the same effect are *National Machine Co.* v. *Standard Shoe Machinery Co.*, 181 Mass. 275 (per Holmes, C. J., citing Lord Blackburn's judgment in the *Mersey* case, *supra*), and *Helgar Corp.* v. *Warner*, *ubi supra* (citing the *National Machine Co.* case).

Lord Blackburn's judgment in *Mersey Co.* v. *Naylor* appears to be the *locus classicus*, and we venture to quote from it at some length:

> "But (counsel) contended that whenever there was a breach of the contract at all (I think he hardly continued to contend that after a little while, but he said whenever there was a breach of a material part of the contract) it necessarily went to the root of the matter. I cannot agree with that at all. I quite agree that when there are a certain number of tons of the article delivered, it was a material part of the contract that the man was to pay, but it was not a part of the contract that went to the root of the consideration in the matter. There was a delay in fulfilling the obligation to pay the money, it may have been with or without good reason (if that would have made any difference), but it did not go to the root or essence of the contract, nor do I think that there is any solid principle upon which it could do so. I repeatedly asked (counsel) whether or not he could find any authority

* "Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale."

> which justified him in saying that every breach of a contract, or even a breach which involved in it the non-payment of money which there was an obligation to pay, must be considered to go to the root of the contract, and he produced no such authority."

Strong indication that the—ordinarily *unspecified*—time for taking delivery is by no means of the essence, is to be found further in Sec. 51 of the *Uniform Sales Act*, which defines the buyer's liability for failing to accept delivery, as follows:

> "When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the rights against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default."

The cases cited by the Court of Appeals do not assist respondent. In the *Jacksboro* case, the court held that the buyer was liable for the price only in the event it waived the premature shipment—in exact accord with *Bowes* v. *Shand, supra*. In the *Fortson* case, the seller was upheld in refusing delivery after repeated requests for shipping instructions, and after granting buyer an extension for a reasonable time to give shipping instructions—which buyer did not furnish within such time.

The *United Irrigation Co.* case likewise is plainly distinguishable: (a) in that the contract there fixed, directly, the time ("not later than September 1") within which the agreed quantity "must be taken"; (b) in that the seller there waived strict compliance with the agreed time for taking delivery; (c) in that the buyer, at the time of the seller's refusal to deliver the remaining cars, had been in default for about a month; and (d) in that "the price of fuel oil was subject to frequent and substantial fluctuations, whereby contracts providing for delivery of fixed quantities of the product over long periods would involve unusual hazards to the parties".

In *National Commodity Corp.* v. *American Fruit Growers,* 45 Del. 169 (a decision by a court of first instance), the question of the time of the buyer's "call or demand for shipment or delivery" being "of the essence", appears to have been assumed rather than debated. If the case is an authority in respondent's favor at all, it is clearly contrary to the weight of principle and authority.

Nor does the requirement of a letter of credit tend to show a mutual intention that any momentary and merely prospective uncertainty, due to some unforeseen event, as to whether the letter of credit is going to be appropriately extended, afford a ground for treating the time of payment as of the essence. There is nothing in the contract, express or implied, to preclude unilateral extension of the term of the credit by the buyer—not, to be sure, as an arbitrary means ("option") to prolong the seller's obligation, but solely to restore the seller's security for payment.

momentarily jeopardized by the unforeseen turn of events. Extensions of letters of credit, of course, are very common; and the buyer in such case should have an opportunity to arrange—promptly—for any necessary extension. Such a situation resembles the buyer's supervening insolvency—which "does not dissolve the bargain; it merely revives the seller's lien." *Williston on Sales*, Sec. 507a, at p. 105.

> "If the party from whom the second performance is due becomes insolvent, this, though not in itself even an anticipatory breach of the contract, excuses the other party from giving the agreed credit, though there is no excuse if concurrent performance is offered, or presumably if adequate security for performance at the agreed period of credit is offered" (*Williston on Sales*, Sec. 577, pp. 221-2).

There is no room, therefore, for inferring a mutual intention, at the making of the contract, that any passing, and readily solvable, uncertainty as to the buyer's ability to extend the credit, would operate as a condition (subsequent), finally discharging the seller from any further obligation under the contract.

Since, therefore, the time of acceptance and payment clearly was not of the essence of petitioner's duty, petitioner's "preliminary obligation" of nominating a dock in both ports, could not be such; and the Court of Appeals erred in treating the slight delay as the non-fulfilment of a "condition", putting an end to respondent's duty to deliver such part of the rice as it might *"intend"*—unilaterally—"under (its) option" to deliver at Houston.

We submit that the Court of Appeals has decided Question 1 in a way in head-on conflict with applicable common law principles. It is further submitted that the Court's treatment of punctual delivery as "of the essence" of *both* parties' duties under the contract conflicts with the decision of the Court of Appeals for the Fourth Circuit in *LeRoy Dyal Co.* v. *Allen*, 161 F. 2d 152. (See above).

POINT II

Respondent's deliveries to Lake Charles after the purported cancellation "with respect to the 45,600 pockets which had been intended under (its) option" for delivery at Houston, constituted an election to reaffirm respondent's total obligation under the contract.

Neither the seller's "option to split the deliveries betwixt Lake Charles and Houston"; nor fixation of the price "on a per pocket basis"; nor the bank's promise to pay "for partial shipments" under the letter of credit (Opinion, p. App. 34) made the contract "divisible", so as to give the seller the choice, in case of a breach on the part of the buyer, to "apportion" such breach, and, by means of such "apportionment", to decide, unilaterally, *what part* of the contract it would perform, and what not, by the simple device of changing its "intention" as to the number of pockets it was going to deliver at *either* port. None of these elements gave either side a right to "set off * * * a portion of the price * * * against a portion of the performance". (*Williston on Contracts*, secs. 860, 861.)

In *Norrington* v. *Wright, supra,* this Court said (at pp. 203-4; 204-5):

> "The contract sued on is a single contract for the sale and purchase of 5,000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments or deliveries of so many distinct quantities of iron. *Mersey Co.* v. *Naylor,* 9 App. Cas. 434, 439. * * *
>
> The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once."

In *Reuter* v. *Sala,* 4 C. P. D. 239 (discussed, 115 U. S. at pp. 209-210), the seller had the choice of "*October and/or November shipment,* * * * the name of the *vessel or vessels* * * * to be declared to the buyer" (italics ours); and yet the contract was held to be "entire", and the buyer to be within his rights in refusing to accept anything less than the total quantity contracted for.

The *Simms-Wylie* case (cited by the Court of Appeals) was an action for specific performance, in

respect of one lot, of a contract for the sale of several lots; and the Court held, in the light of the manner of performance, that "the parties treated this contract as severable" (p. 267). We fail to see any similarity between that case and this.

Lastly, the Court's reasoning that, "by continuing with the Lake Charles delivery the appellee did not deliberately intend to waive its right to cancel the Houston deliveries", is quite immaterial. At the time of cancellation "the Houston deliveries" existed only in the seller's mind ("intended"), except as affected by the *previous* deliveries to Lake Charles. *Regardless* of what respondent *intended*, its shipments to Lake Charles after December 17 amounted to a conclusive election to reaffirm its entire contractual obligation. *Williston on Contracts*, secs. 683, 684, 687, 688; *Williston on Sales*, Sec. 191b and c; *Corbin on Contracts*, Sec. 755; *In re Malko M. & L. Co.*, 32 F. 2d 825; *Schulder* v. *Ladew*, 178 App. Div. 458; 165 N. Y. Supp. 504; *Restatement of Contracts*, sec. 309. In *Newark S. C. Co.* v. *N. Y. Credit Men's Adj. B.*, 186 F. 2d 152, the Court of Appeals for the Second Circuit (Circuit Judges L. Hand, Swan and Chase) stated (at p. 154):

> "If one party to a contract continues performance after a breach by the other, he must continue on the contract terms." (Citing *Williston on Contracts*, Sec. 688.)

The Court's (*sub silentio*) assumption that the contract here was of the "instalment" type, (a) is unwarranted, because of the absence of any mutually "stated instalments" (*cf. Uniform Sales Act*, Sec.

45); and (b) even if warranted, would make no difference. *Norrington* v. *Wright, supra,* at pp. 203-4.

The Court of Appeals thus has decided Question 2 also in a way plainly contrary to applicable common law principles.

The present case, we submit, affords this Court an opportunity worthy to be taken, not only to settle fundamental and important questions of commercial law, but also to prevent the added confusion and the further lowering of "the morals of the market place" likely to result from the decision of the Courts below.

CONCLUSION

The petitioner prays that a writ of certiorari be granted, the case reviewed, and the decision of the Court of Appeals for the Second Circuit reversed.

Respectfully submitted,

FRANK MARCELLINO,
Attorney for Petitioner.

PETER J. KOOIMAN,
Of Counsel.

Opinion of District Court

#23132

DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF NEW YORK

INTERNATIO-ROTTERDAM, INC.,
Plaintiff,

—against—

RIVER BRAND RICE MILLS, INC.,
Defendant.

APPEARANCES:

ABBERLEY, KOOIMAN & AMON, Esqs.,
Attorneys for Plaintiff
55 Liberty Street
New York, New York
Peter J. Kooiman, Esq., and
Frank Marcellino, Esq., Of Counsel

IDE & HAIGNEY, Esqs.,
Attorneys for Defendant
51 East 42nd Street
New York, New York
John E. Haigney, Esq., and
Leonard M. Speier, Esq., and
Peter R. Rado, Esq., Of Counsel

OPINION

WALSH, D. J.

Plaintiff is an exporter, defendant a miller of rice. In July, 1952 plaintiff assembled and contracted to buy a shipload of rice for resale to a Japanese cus-

tomer, C. Itoh & Co., Ltd. It did this through a Louisiana broker, James M. Trotter. The physical assembly of the rice and the loading of the vessel were to be handled by two freight forwarders, H. S. Thielen in Lake Charles, Louisiana, and Herman F. Weber in Houston, Texas. Lloyd A. Villeret, defendant's Vice-President in Houston and John P. Fochtman and Thomas Gaffney for the plaintiff were the representatives of the parties most closely connected with the transaction.

The controversy concerns 46,500 pockets of rice which were part of 96,500 pockets which defendant had agreed to deliver f.a.s. at Lake Charles, Louisiana or Houston, Texas. Defendant rescinded the agreement as to this portion because of plaintiff's failure to call for delivery in time to permit delivery in December and allow for the two weeks call for which the agreement provided.

I think I must dismiss the complaint. I think in summary that the delivery in December was an essential part of the contract in the sense that the defendant had no obligation to deliver any other time and could rescind before being forced into a position where it would have to make a later delivery. I think that whether you call it a condition precedent or a promise, the requirement of two weeks' notice was of sufficient importance that failure to give it justified rescission. In other words, as of midnight, December 17th, the failure to give shipping instructions to the defendant gave it a proper basis for rescission.

I think that my position is not too far from that of Mr. Villeret as he discussed it with Mr. Ross. It was perhaps a technical question, a fine question, and

I think they approached it that way, but I think they approached it within their rights and it was a proper decision for them to make and they are therefore not actionable in this lawsuit.

The memorandum of agreement specifies shipment in December, 1952, with two weeks' call from buyer. Each of the terms, as set forth in this memorandum, seems highly important, and this is one of the ten key terms of the agreement as negotiated. December is the peak of the rice season. All of the parties knew it. It is also the peak of the cotton season, and the piers in Houston are congested because of this, and all the parties knew that.

A second major part of the agreement with which we are concerned related to the letter of credit. This document provided that the defendant would be paid upon presentation of five documents, one of which was a clean dock receipt from Lake Charles and/or Houston showing December delivery. Unless defendant was to be deprived of the protection of this letter of credit or of its right to two weeks' call, shipping instructions from plaintiff were required by December 17th. The plaintiff had been warned that the defendant insisted upon a letter of credit even with its best friends, and that it was a matter of importance to the defendant. In fact, the plaintiff had also been warned that the defendant took a very exact view of its obligations.

Perhaps the findings as to facts may be stated best in chronological form because as to most there is not too much dispute.

The contract was made in July; it is confirmed by memorandum of July 30th.

Opinion of District Court

The memorandum of agreement reads, in part, as follows:

"DESCRIPTION	Certificated U. S. #6 or better milled rice. Mixed milled rice will not be acceptable.
PRICE	$8.25 F. A. S. Lake Charles and or Houston, Texas.
DESTINATION	F. A. S. Lake Charles, La. and or Houston, Texas.
SHIPMENT	December, 1952, with two weeks call from buyer.
* * *	* * *
PACKING	New burlap bags, preferably 12 oz. but in any event of a weight satisfactory to transportation companies.
* * *	* * *
PAYMENT	By confirmed irrevocable letter of credit to be opened immediately payable against:
	1. Dock receipt.
	2. Seller's certified weight sheets.
	3. U. S. Department of Agriculture Quality Certificate.
	4. Invoice properly describing the rice and packing.
	5. Draft."

As soon as the plaintiff had arranged for the purchase of the rice, or perhaps even before, it had

contracted to resell it to C. Itoh, a Japanese purchaser.

The letter of credit was forthcoming as required by the contract, in the middle of August.

Then on September 11th restrictions were placed upon rice exports to Japan and an export license required. This apparently had not been anticipated by any of the parties at the time the contract was made. On the first possible day in October, the plaintiff applied for this export license and, as far as can be seen, pursued all diligent efforts in attempting to obtain one. Between October and December 12th, the Government allocated 75,000 tons to cover the rice shipments to Japan for the last three months of 1952. The plaintiff's December contract was not included in this figure, in this allotment. And as I recall the testimony of Mr. Barclay, plaintiff's President, he had no hope of getting an export license unless either the allocation was enlarged or the allocation for the following three months, January, February, March, 1953, was announced in early December, in which case he had hopes of being able to draw against that for December delivery. In fact, the allocation for the first three months of 1953 was not so announced.

Prior to December 1st, the defendant elected to split its shipment, sending approximately fifty-five thousand pockets to Lake Charles and 46,500 pockets to Houston. I think the important information with respect to this is that Weber in Houston knew he was to be ready to provide for 46,500 pockets; as I recall his testimony, he knew that either in early December or prior thereto.

One more important background fact is that by December the market price for rice had risen to $9.75 a pocket, which was about $1.50 per pocket above the contract price.

Both the defendant and the plaintiff were well aware of steps taken by the government with respect to the export license situation. The defendant was as concerned in a sense as the plaintiff, even though its right to performance did not depend upon it. But it knew of the problems in the rice industry which the export restriction caused and from the earlier correspondence of Mr. Villeret and Mr. Ross, defendant's President, they were obviously apprehensive as to what maneuvers might be forced upon them as a result of it.

I also believe that they were interested in the increased market price and that they had very firmly in mind the advantage which the defendant would gain if they could take advantage of that market price. On the other hand, I do not believe they had any intent to take an illegitimate advantage of it, but they realized as businessmen that this was an opportunity and not to be lightly overlooked if it could be legitimately claimed.

So, then, on December 8th the immediate facts leading to the controversy here began to take shape.

The defendant began to press the plaintiff for shipping instructions in Houston. Plaintiff knew that these 46,500 pockets were to be shipped there; it knew that the mills were in serious difficulty, both because of the fact that this was their natural peak season and because the export restrictions had caused even

more serious difficulties for them in getting their shipping instructions. It of course knew that an f.a.s. transaction, as this was, required it to specify a berth for the delivery of the rice. It also knew, through Weber, than in Houston it could not get such a berth without first chartering a steamer, that the Houston port authorities, who were the only possible source for a pier, insisted upon the name of the steamer and the date of her arrival before they would even set aside a berth to receive her cargo. As of December 8th it knew that the ultimate purchaser, Itoh, had not obtained a charter, although it was Itoh's obligation, as between plaintiff and Itoh, to obtain it. As I have pointed out before, they had been warned by Trotter that the defendant insisted upon exact conformance with its contracts; they had also been warned that other mills had cancelled in November for lack of shipping instructions; and as businessmen they must have known the thoughts which would be uppermost in the defendant's mind in view of the high state of the current rice market.

I think that I will bring into this chronology the facts occurring in Lake Charles even though, as events turned out, I am not sure that these facts are altogether significant. On December 8th, the same day on which the defendant began to press for Houston shipping instructions, Thielen, the Lake Charles freight forwarder, told the defendant's Louisiana mill to start loading the cars, but asked them to hold them so that the free time on the Lake Charles piers would not be dissipated before the arrival of the ship. In so acting, Thielen was admittedly within his author-

ity, although not expressly authorized; this was Thielen's business. In fact, there had been no charter obtained for any vessel; but in Lake Charles unlike Houston—you did not need to have a charter in order to get a berth for your steamer. I believe there was only one berth anyhow. The principal problem there was not to absorb the free time on the cars before the vessel arrived.

On December 10th, the defendant billed its first cars from the Eunice, Louisiana, mill and they started toward Lake Charles.

Now we go back to Houston, which is the main stage of this litigation. On December 11th, the defendant held a very urgent teletype conversation with the plaintiff in which it pressed it for shipping instructions with respect to Houston, or at least for some information. The plaintiff told the defendant that they were still waiting for information with respect to the export license, and they promised information of some sort on the following day.

On the next day, December 12th, Mr. Barclay, who was then President of the plaintiff, pressed Dr. Stewart in the Agriculture Department in Washington for information which would enable him to decide whether to hazard entering into a charter for a vessel to take this rice to Japan or not. He got a sufficient reply from Dr. Stewart in the sense of "maybe" that he inferred that the outcome would probably be favorable, and on this assumption he then began to perform certain acts. Plaintiff's own organization then undertook to get a vessel because Itoh had failed. One of the officers of the plaintiff then also called the de-

fendant and told it that although it could still give no shipping instructions, things began to look favorable with respect to the license.

Turning back to Louisiana, on that day, December 12th, the cars began to arrive at Lake Charles, and there was no ship yet chartered and there was no ship's agent to give a dock receipt.

On, I believe it was, Saturday, December 13th, Thielen, who had the cars of rice then coming into Lake Charles, gave out information to the millers that a Japanese vessel had been chartered. This was not true. In fact, it never had been so chartered and never was, but it was apparently based on information Thielen had received from the plaintiff, who in turn had been informed by Itoh, or its San Francisco office, that the chartering of a vessel was close to culmination.

I think that Mr. Gaffney, now in charge of the transaction for plaintiff, testified it was either on December 12th or December 13th—my own inference would be it would probably be on December 15th—that Mr. Thielen spoke with Mr. Gaffney about the rice that was coming into Lake Charles and the fact that the millers could not get their money because there was no ship's agent to give them a dock receipt, which was necessary under the letter of credit. And Mr. Gaffney agreed to have the letter of credit amended to permit payment on a simple forwarder's receipt which Thielen could give. Now, the reason I pick December 15th is that I doubt that Mr. Gaffney would let this go over the weekend, but I do not regard the date, whether it was December 13th or December 15th, as of significance.

On December 15th, Mr. Gaffney instructed the San Francisco office of the plaintiff to amend the letter of credit to permit payment on simple forwarder's receipts. Incidentally, Mr. Gaffney had also earlier sent a memorandum to the San Francisco office warning that the defendant expected exact compliance with its contract and therefore to be on the alert with respect to this particular transaction. Neither Mr. Gaffney nor Mr. Thielen, nor Mr. Trotter, nor anyone else, at that time communicated with the defendant as to this pending change in the letter of credit.

On December 16, which was Tuesday, the plaintiff chartered the Angus Glen. The defendant was informed of this late in the afternoon. Mr. Weber, the Houston freight forwarder, also was informed. And at that point Weber was able to commence concrete efforts to get a berth for this vessel in Houston.

On December 17th, which was the last day remaining which would permit two weeks' notice for a December delivery, Weber tried, unsuccessfully, all day to get a berth for the Angus Glen. He was turned down by everyone except Land, the superintendent of the city piers, and Land refused to give him any commitment. The defendant, through its Houston office, was pursuing Weber for shipping instructions. He told them of the berth prospects as he knew them, that he had nothing then but that he hoped for a break at any time. Someone in the defendant's office told Mr. Weber that the rice was already loaded in the El Campo mill, or at least in part, and that it was blocking tracks to the defendant's warehouse and they were anxious to move it, and Mr. Weber asked

them to hold it and that he would cover demurrage if that were necessary.

On this day, December 17th, the Bank of America also mailed out to the shippers a notification of the amendment of the letter of credit permitting payment against simple forwarder's receipts. This letter, however, did not arrive at the defendant's office until December 19th.

On December 17th also the defendant's officers were conferring via teletype as to what should be done, and there was no mincing of words. They were aware of the market and they were wondering about their obligation to their corporation not to overlook taking advantage of a breach by the plaintiff if plaintiff made one.

There is no doubt that there was no express warning of cancellation given on that day to Weber or anybody else in the plaintiff's organization. In fact, I am not sure that the defendant's officers had finally crystallized their own thinking as to what they were going to do at the close of business on Wednesday, December 17th. But I think they were very close to that point. My recollection is that it was in the first teletype conversation of December 18th, early in the morning, that they finally decided that they were going to cancel and that that was the best way to handle the situation.

On December 18th, the defendant's Vice-President Villeret asked Weber if he had a berth. Weber said "No", but again he had hopes and he expected to hear from Land later that morning. At this time Villeret did not say that he was going to cancel, but he did say that he advised Weber not to make any commitments

for space without a further check with Villeret. This could only mean one thing to Weber, I assume, and it meant—that Villeret was in an oblique way tipping off Weber but at the same time not making any express statement at that moment of his position. His express statement came shortly thereafter in the carefully worded notice of cancellation which was sent to plaintiff that morning. While this message was in the course of transmission Weber called to say that Land, of the Houston City piers, had agreed to let him put the cars of rice in the yard, in the assembly yards of the piers, but that he would not give him any assurance as to when they could be unloaded and he could not give him a berth for the vessel. Weber gave this information to Villeret, and Villeret told him that the message of cancellation was already on the wire. In the course of the conversation Weber also offered on behalf of plaintiff to pay for the demurrage on the ars during the period that they were held in the assen. ly yard. Defendant stood upon its notice of cancellation.

On December 19th, the defendant got its first information as to the amendment of the letter of credit. I think on that data it also received from Thielen its first batch of simple forwarder's receipts which had been sent out the preceding day from Lake Charles. On December 19th also, Mr. Gaffney telegraphed defendant, telling it that the letter of credit had been amended to permit delivery against forwarder's simple receipts.

Now, I think that is the end of the facts regarding the particular transaction.

During the balance of the month, in other words, from December 19th through December 30th, cars were

being sent from the defendant's mill in Louisiana to Lake Charles, and I think the last was received there on December 30th, and they were delivered against simple forwarder's receipt signed by Thielen, and the defendant drew upon the letter of credit on the basis of these receipts.

December 24th, the plaintiff got its export license. The Angus Glen sailed from Lake Charles on January 2nd and got to Houston on January 4th.

In view of my conclusion on other grounds, I do not think it is now material, but I will find that the plaintiff apparently covered its rice commitments to C. Itoh by taking an advance on its January contract with defendant, and that the cost to the plaintiff was ten cents a pocket above that of the December contract. This is the amount of the difference in the price between contracts for December and contracts for January delivery as previously entered into by plaintiff and defendant.

Now, on the law, I think the first question, although I do not regard it as the most important, is the law of which state governs. I am not sure that there would be any different result regardless of which law were applied. Here the place of performance, at least as to the Houston end of the transaction, was Texas. I believe that Texas was probably the state in which the words "I accept" or the equivalent were uttered. And therefore with respect to the contract made over the telephone it would be the place in which the contract was made. I base this conclusion on Mr. Fochtman's recollection that he believed in this case he gave Trotter a firm bid to extend to the millers, and under those circumstances the likelihood is that the accept-

ance was given by the miller. I do not believe that as far as the negotiation of the contract was concerned Mr. Trotter's place of business was a significant factor. He was simply the conduit relaying a message from New York to Texas, not minimizing Mr. Trotter's importance when it came to getting the contract executed. I think that even if the contract were made in Louisiana there would be substantial basis for applying the law of Texas anyhow. The New York rule of conflicts of law would be applicable here, and under *Auten* v. *Auten,* 308 N. Y. 155, 124 N. E. 2d 99, the question seems to be which factors are the most substantial and, in which state did they occur or was it contemplated that they would occur. And without making any sharp division between performance and interpretation, where the question is the significance or the materiality of one act with respect to another incidental to performance, the significance or materiality of what the plaintiff is required to do to facilitate the defendant's performance in order to obligate the defendant to perform, I think the better conclusion is to look to the law of Texas where these acts were performed or omitted, particularly as control of this transaction was not held by anyone in Louisiana, but left by both parties to their Houston agents.

To come down to the merits, the defendant contends that the rescission was proper because December performance was called for and two weeks' call was specified, and that after December 17th it was impossible for the plaintiff to comply and that therefore defendant had the right to rescind.

The plaintiff disputes that performance in December is essential, at least insofar as the seller is con-

cerned. And although, as I understand it, it would concede that by failing to give two weeks' notice the plaintiff at least lost the right to insist upon December performance, it claims it did not lose the right to insist upon some performance if the performance was reasonably close to the end of December and upon *reasonable notice. Plaintiff would also concede that* defendant was entitled to two weeks' notice; that this was a reasonable period and that this was the period agreed to. Plaintiff claims that if defendant had given the contract this flexible construction the transaction could have been completed; that actually the plaintiff's vessel got to Houston on January 4th, that indeed the defendant did finally sell plaintiff at a higher price a substantial part of the very rice involved and it was shipped on this vessel.

Plaintiff's first claim is that the arrangement that Weber worked out with Land on December 18th would have permitted the defendant to start shipping, and that, certainly coupled with the amendment of the letter of credit which Thielen had negotiated, that would have permitted the defendant to start shipment on December 19th when it learned of the amendment to the letter of credit.

My conclusion is that it is not necessary for the defendant to hold the rice for late delivery, in January, and then beat plaintiff in a lawsuit if it did not want to take it. It may well be that the plaintiff, and I think it obviously was true, was liberal in its amendments of letters of credit, and that there had been informality of dealing among the parties, but I do not think that in a business transaction like this, such a course of dealing requires the defendant to fail to exercise its right to rescind.

As to the essentiality of performance in December. I believe that the agreement was to ship rice in December and that shipment on any other date was not to be required of the defendant; if it could not ship in December it was entitled to rescind. My reasons for concluding this are, first, that rice is a commodity with a fluctuating market. Mr. Frochtman so testified. He said that when you buy rice you have to check it from day to day or at least week to week. Then we have the facts here that contracts made in July put a different value on January deliveries from those in December. The July contract prices were $8.35 for January delivery and $8.25 for December delivery. And we certainly see what happened to the market price between July and December. It was up to $9.75. Mr. Barclay said that during this period the market on rice was fairly stable, but of course that is a relative term. Nevertheless, to me it looks like an article with a fluctuating market. And it has been so held by other courts. Especially in view of the world situation then and the hazards of unexpected restrictions on export, I will find that rice was a commodity with a fluctuating market.

I believe that the seller as well as the buyer is entitled to treat time as "of the essence" and that, without generalizing, in this particular case I think that the seller certainly regarded the time of delivery as an essential term of the contract.[1] In other words, no delivery in December, no contract.

Further, all of the parties realized the peak conditions at this period of the year and the need for the

[1] See *Norrington* v. *Wright*, 115 U. S. 188; *Alpena Portland Cement Co.* v. *Backus*, 156 Fed. 944, 947.

defendant to keep his mill in operation and to keep the rice moving. We can't pass upon the essentiality of the time of delivery on the assumption that the defendant had only one customer, the plaintiff. It had other problems to think about.

And, finally, the letter of credit specified December shipment, and that alone would make this an essential term, particularly in an export transaction. And, again, the plaintiff had been warned as to the defendant's insistence upon exact compliance in this regard.

Now, having concluded that performance in December was essential I do not think it makes too much difference whether you regard the requirement of two weeks' notice as a condition precedent or not, because I think under all the facts of this case it was sufficiently important to the defendant to be called essential. As I see it, a condition precedent is an act which must be done or an occurrence which must happen without which the other party to the contract can't be called upon to perform. In other words, its essentiality is so obvious either from the express language of the agreement or otherwise that you do not have to prove it.

Now, that essentiality sometimes can be established by the terms of the agreement itself, and if they said, "No two weeks' call, the contract is off", why, then we would not have that problem. But these contracts are not negotiated with that degree of formality. They are negotiated over the telephone and the written confirmation is rather cryptic. But in so far as we look to the language for its meaning it certainly suggests that of a condition precedent. It says, "Shipment December, 1952, with two weeks' call from buyer".

The emphasis on month of shipment and length of call seems equal. Having concluded that December, 1952, was an essential term, the two weeks' call from buyer seems to me essential, too. And I would say it is a condition precedent, that the fair reading of this provision required a call on December 17th at the latest.

I do not think any of us doubt that reasonable notice of some sort is a condition precedent to an obligation to deliver f.a.s. And I will go further and say that when the time fixed for delivery has been exhausted to a point that there is no remaining time to give this reasonable notice, that the buyer has lost the right to insist upon delivery at all. See *National Commodity Corporation* v. *American Fruit Growers*, 6 Terry (45 Del) 169, 70 A. 2d 28.

Further, I do not think there is any serious dispute among the parties that two weeks is a reasonable period to require for a call from the buyer. We are not here concerned with what is the bare minimum that the seller needs to get this rice to a vessel. The question is not what can he do in extremis. My conclusion, again based to a substantial degree on Mr. Fochtman's testimony, is that two weeks is the reasonable minimum. He testified that two weeks was considered the reasonable period in November, even though there was no express term in the contract for the November deliveries requiring it. So the two-week period is probably the period the Court would reach on its own as the reasonable period of call which the defendant was entitled to, that delivery could not be required on less than two weeks' call. But here it is important that the parties, the experts in this field

of rice and mercantile transactions, have expressly fixed this as the period, and it certainly is not for the Court to set it aside and disregard it.[2]

So, as I read this memorandum, the defendant did not agree to be bound by any contract at all except for delivery in December, 1952, and then only after receiving two weeks' call from the buyer.

Even if we say this is not a condition precedent, it is a promise of sufficient materiality to justify recession. I agree with Mr. Haigney that in any event it was so material to the agreement that even if he just regarded it as a promise it was an essential one—its performance was essential to the contract itself. I do not think the test that Mr. Kooiman seems to suggest from time to time, whether failure to give this two weeks' notice to the defendant made performance literally impossible, is the fair test. Whether the defendant happened to have the rice bagged and ready to ship or whether it did not, that was the defendant's business and could not alter its rights under this contract. The defendant was making a contract to deliver on certain terms and had a right to rescind on others. The question is whether the contractual provision for a two weeks' call was so nearly identical with the time defendant would reasonably be expected to require that the parties at the time of making the agreement must have recognized it as an essential term of the contract, a term so significant that to compel defendant to perform in disregard of it would be to compel it to perform a contract essentially different from the one into which it entered. I believe the pro-

[2] See *Alpena Portland Cement Co. v. Backus, supra*, 156 Fed. 944

vision was of such significance and that the parties so understood it. On the question of materiality we must again consider the fluctuating nature of the market. The congestion and uncertainty resulting from the need for the export license only aggravated what would have been another serious problem anyhow, namely, that occurring from the size of the shipment and the nature of the product. The rice was of a type designed for export; its broken kernels were not much used in this country; and the size of 96,000-odd pockets, or half of that, or 46,500 pockets, was such a large amount that its assembly and delivery would reasonably require at least two weeks after receiving shipping instructions. Other reasons, such as the peak season, and so forth, support again this conclusion as to the materiality of the provision for the two weeks' call. Defendant had to have some flexibility in order to enable it to meet the demands of other customers as well as the plaintiff.

The materiality of this call I think is also established in the scraps of fact which come through the correspondence relating to other things; the fact that other millers were clamoring for shipping instructions; that there had been cancellations in November for lack of them, as Trotter had warned. In other words, the materiality of this clause, or the materiality of this provision as it was agreed to in July, certainly became underlined and more apparent as we move on toward December, in view of the export difficulties.

The next question is, without waiting until the end of December, what was the date at which defendant

was entitled to know that the plaintiff was going to pick up this rice and get it out of the defendant's hands and exactly how it was going to be accomplished. Defendant was confronted with a real hazard here. The ultimate acceptance of this rice, looking at it now as of December 18th, was not a foregone conclusion. At that point there had been no export license issued to the plaintiff. At that point the Houston piers were in a state of congestion. Whether or not the plaintiff would pick up this rice at all in view of the uncertainty of its right to export it, is something that as far as the defendant was concerned at that point turned upon the honor of the plaintiff and the possibility that the high market price would justify its undertaking in spite of what would have been a very considerable strain to its credit, to take this rice even if it could not export it. But the law of contracts was not written around the honorable man; the law of contracts was written around the man that was less predictable. And so the defendant in a business transaction was entitled to look at the situation, as far as the law is concerned, as though the eventual picking up of this rice was in a very real sense not a foregone conclusion at all. When time no longer remains for the buyer to perform conditions essential to his right to receive delivery the seller has the right to rescind.

I might add that one of the cases which Mr. Kooiman gave me a quotation from had an interesting expression, "equitably still in time". I think it was a Louisiana case. I think it is a dangerous test for a court to apply where, as I say, you have experts in the market who have specified what they want when

they make this transaction in terms which are not so ambiguous that we can't give them pretty literal application. But I might say that I am not sure that the equities are easily placed on one side or the other here. As I see it, both parties were facing difficulties—the plaintiff because of the export situation and the defendant because its mill was being jammed up. And I think it is a dangerous thing for the Court to start to appraise and balance, upon some equitable basis, the maneuvers of parties as they calculate demurrage, free time, and so forth. They had all that in mind when they specified exactly the terms of shipment in their agreement. I do not think that the Court, in the presentation of a case even as carefully and fully as this was presented, is in a position to speculate in that regard. So I would not lightly be moved to apply such a test.

But if I did, it seems to me that the fundamental problem here is the procrastination of the plaintiff. I do not see why the plaintiff, who was confronted with this situation, if it really wanted this rice, did not move in sufficient time, when it found that it could not get the dock or was informed well ahead of time of the trouble it would have in getting the dock, why it did not then tell the defendant that it would accept some other form of delivery and liberalize the letter of credit accordingly. I do not see anywhere in the record any basis for requiring the defendant to indulge the plaintiff beyond the specified date in this regard.

I might say now, as to the various claims of the plaintiff, first, that the Houston arrangement did not

constitute shipping instructions. The information which Trotter sent along on December 16th of the name of the vessel, and the approximate date of her arrival, even if he gave the name of the shipping agent, which I do not think he did, that would not constitute shipping instructions that the defendant was entitled to. That did not tell it where it could ship its rice or what it could do to get paid. At that time there had been no information given to the defendant with respect to the liberalization of the letter of credit and there just was not any place to consign the freight cars to.

Even after Mr. Weber belatedly got the agreement of Mr. Land to permit the sending of these cars to the assembly yard, the defendant still had no assurance that it would be paid under the letter of credit; and although Mr. Weber said he would pay the demurrage that is not the same thing as being told of a place where you can send your rice and get a clean dock receipt if your rice is in good quality and in good condition. There are a whole lot of things that can happen while the cars lay in the yard, and if you are going to be required to come up with a clean dock receipt in the end I do not think being told to send your cars to an assembly yard constitutes shipping instructions. The shipping instructions required the name of a place where the rice could be sent in return for a document on which defendant could be paid. Defendant was not informed of the liberalization of the letter of credit until the day after the contract had been rescinded.

I do not believe that the defendant had a duty to make a further demand or to lay this all out in words of one syllable for the plaintiff or for Mr. Weber.

They all understood, and in fact plaintiff's President, Mr. Barclay, rather eloquently wrote the Department of Agriculture as to the problems which the defendant and all the other millers were sharing at that time.

Neither do I think there was any extension in the period to give shipping instructions in anything that Mr. Villeret said or did. No one testified that he expressly authorized the plaintiff to wait beyond December 17th to give shipping instructions. The most that you can say is that when Weber said he had hopes of hearing from Mr. Land on December 18th Mr. Villeret did not tell him that would be too late. In other words, Mr. Villeret let him go ahead and try to get a pier if he could. This did not constitute an estoppel or a modification of the contract. In any event, inasmuch as Mr. Weber never came up with a berth to which he could ship, on December 18th, why, I think there is no significance to that contention at all.

As far as plaintiff's contention that the Lake Charles shipment or what the defendant did there somehow ratified a deal whereby defendant would ship on Weber's proposal in Houston, I do not think there is any basis for such a finding. The Lake Charles situation is quite different from that in Houston. In Lake Charles the defendant was given shipping instructions and they shipped promptly and willingly and cooperated with the plaintiff's freight forwarder as best they could. At the time that movement started there was still no failure by the plaintiff to perform in Houston. After that movement was substantially on the way I do not think that there are any inferences to be drawn from the fact that the defendant

let it continue. It had then got its rice out of its plant into freight cars. Incidentally, we can't overlook the fact that Thielen gave out to the defendant and other millers false information at this time to the effect that a vessel had been chartered and impliedly that there would be shipping agents authorized to give dock receipts for the rice. The fact is that all of those Louisiana millers got into a mess acting on Thielen's instructions and false information. If then Thielen and the plaintiff and the others worked out a form of alternate delivery which mitigated their hardship I do not see any basis for concluding that such a mitigation binds them to get into a similar mess in some other city.

The Lake Charles situation was brought about wholly through the action of Thielen and the plaintiff. It was not a bargained situation in which defendant voluntarily participated in any sense. Neither defendant nor any of the millers got into it voluntarily. I therefore do not see how you can spell out of their being victimized by it any ratification of a change in the contract beyond the resolution of the immediate difficulties in Lake Charles.

Finally, I do not think that there is any basis to a claim for estoppel because Villeret did not tell Weber on December 17th that if he did not have the pier by midnight he was going to be out of luck. There is nothing that Weber could have done to get a pier any faster. And if Weber had in mind the liberalization of the delivery requirements or if plaintiff had it in mind, their time to stop playing poker had come and passed. It was up to them to know the date on which

they were required to act under the contract and for them to come forward with some timely suggestion, not for the defendant to make a demand.

I think I have already said that there isn't any doubt in my mind that the defendant's officers had well in mind that the rice market had gone up. On the other hand, I do not find that they have acted in any way dishonorably or beyond their rights in taking advantage of plaintiff's failure to act under the contract. The crux of the matter is plaintiff's failure to take steps to meet this situation in due time, and I do not think it can say that its problems with the export licenses were any justification for its procrastination. The liberalization of the letter of credit and the method of delivery which developed haphazardly at the last minute should have been anticipated and submitted to the defendant and the other millers in due time.

That is my conclusion. And I dismiss the complaint.

LAWRENCE E. WALSH
United States District Judge

Dated: November 26, 1956.

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 126—October Term, 1957.

(Argued January 7-8, 1958 Decided September 12, 1958.)

Docket No. 24592

INTERNATIO-ROTTERDAM, INC.,

Plaintiff-Appellant.

—v.—

RIVER BRAND RICE MILLS, INC.,

Defendant-Appellee.

Before:

HINCKS, LUMBARD and WATERMAN,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Lawrence E. Walsh, *Judge*, entered at the close of the plaintiff's case, dismissing plaintiff-appellant's complaint. *Affirmed.*

PETER J. KOOIMAN, of Abberley Kooiman & Amon, New York, N. Y. (Abberley Kooiman & Amon, and Frank Marcellino, New York, N. Y., on the brief), *for plaintiff-appellant.*

Opinion of Court of Appeals

JOHN E. HAIGNEY, of Ide & Haigney, New York, N. Y. (Ide & Haigney, and Peter T. Rado, New York, N. Y., on the brief), *for defendant-appellee.*

HINCKS, *Circuit Judge:*

Appeal from the United States District Court, Southern District of New York, Walsh, *Judge,* upon the dismissal of the complaint after plaintiff's case was in.

The defendant-appellee, a processor of rice, in July 1952 entered into an agreement with the plaintiff-appellant, an exporter, for the sale of 95,600 pockets of rice. The terms of the agreement, evidenced by a purchase memorandum, indicated that the price per pocket was to be "$8.25 F.A.S. Lake Charles and/or Houston, Texas"; that shipment was to be "December, 1952, with two weeks call from buyer"; and that payment was to be by "irrevocable letter of credit to be opened immediately payable against" dock receipts and other specified documents. In the fall, the appellant, which had already committed itself to supplying this rice to a Japanese buyer, was unexpectedly confronted with United States export restrictions upon its December shipments and was attempting to get an export license from the government. December is a peak month in the rice and cotton seasons in Louisiana and Texas, and the appellee became concerned about shipping instructions under the contract, since congested conditions prevailed at both the mills and the docks. The appellee seasonably elected to deliver 50,000 pockets at Lake Charles and

on December 10 it received from the appellant instructions for the Lake Charles shipments. Thereupon it promptly began shipments to Lake Charles which continued until December 23, the last car at Lake Charles being unloaded on December 31. December 17 was the last date in December which would allow appellee the two week period provided in the contract for delivery of the rice to the ports and ships designated. Prior thereto, the appellant had been having difficulty obtaining either a ship or a dock in this busy season in Houston. On December 17, the appellee had still received no shipping instructions for the 45,600 pockets destined for Houston. On the morning of the 18th, the appellee rescinded the contract for the Houston shipments, although continuing to make the Lake Charles deliveries. It is clear that one of the reasons for the prompt cancellation of the contract was the rise in market price of rice from $8.25 per pocket, the contract price, to $9.75. The appellant brought this suit for refusal to deliver the Houston quota.

The trial court, in a reasoned but unreported opinion which dealt with all phases of the case, held that New York would apply Texas law. *Auten* v. *Auten*, 308 N. Y. 155, 124 N. E. 2d 99. We think this ruling right, but will not discuss the point because it is conceded that no different result would follow from the choice of Louisiana law.

The area of contest is also considerably reduced by the appellant's candid concession that the appellee's duty to ship, by virtue of the two-week notice provision, did not arise until two weeks after complete shipping instructions had been given by the appellant. Thus on brief the appellant says: "[w]e concede

(as we have done from the beginning) that on a fair interpretation of the contract appellant had a duty to instruct appellee by December 17, 1952 as to the place to which it desired appellee to ship—at both ports, and that, being late with its instructions in this respect, appellant could not have demanded delivery (at either port) until sometime after December 31, 1952." This position was taken, of course, with a view to the contract provision for shipment "December, 1952": a two-week period ending December 31 would begin to run on December 17. But although appellant concedes that the two weeks' notice to which appellee was entitled could not be shortened by the failure to give shipping instructions on or before December 17, it stoutly insists that upon receipt of shipping instructions subsequent to December 17 the appellee thereupon became obligated to deliver within two weks thereafter. We do not agree.

It it plain that a giving of the notice by the appellant was a condition precedent to the appellee's duty to ship. Corbin on Contracts, Vol. 3, §640. *Id.* §724. Obviously, the appellee could not deliver free alongside ship, as the contract required, until the appellant identified its ship and its location. *Jacksboro Stone Co.* v. *Fairbanks Co.*, 107 S. W. 567; *Fortson Grocery Co.* v. *Pritchard Rice Milling Co.*, 220 S. W. 1116. Thus the giving of shipping instructions was what Professor Corbin would classify as a "promissory condition": the appellant promised to give the notice and the appellee's duty to ship was conditioned on the receipt of the notice. *Op. cit.* §633, p. 523, §634, footnote 38. The crucial question is whether that

condition was performed. And that depends on whether the appellee's duty of shipment was conditioned on notice *on or before December 17,* so that the appellee would have two weeks wholly within December within which to perform, or whether, as we understand the appellant to contend, the appellant could perform the condition by giving the notice later in December, in which case the appellee would be under a duty to ship within two weeks thereafter. The answer depends upon the proper interpretation of the contract: if the contract properly interpreted made shipment *in December* of the essence then the failure to give the notice on or before December 17 was nonperformance by the appellant of a condition upon which the appellee's duty to ship in December depended.

In the setting of this case, we hold that the provision for December delivery went to the essence of the contract. In support of the plainly stated provision of the contract there was evidence that the appellee's mills and the facilities appurtenant thereto were working at full capacity in December when the rice market was at peak activity and that appellee had numerous other contracts in January as well as in December to fill. It is reasonable to infer that in July, when the contract was made, each party wanted the protection of the specified delivery period; the appellee so that it could schedule its production without undue congestion of its storage facilities and the appellant so that it could surely meet commitments which it in turn should make to its customers. There was also evidence that prices on the rice market were

fluctuating. In view of this factor it is not reasonable to infer that when the contract was made in July for December delivery, the parties intended that the appellant should have an option exercisable subsequent to December 17 to postpone delivery until January. *United Irr. Co.* v. *Carson Petroleum Co.*, 283 S. W. 692; *Steiner* v. *United States*, 36 F. Supp. 496 (D. D. C.). That in effect would have given the appellant an option to postpone its breach of the contract, if one should then be in prospect, to a time when, so far as could have been foreseen when the contract was made, the price of rice might be falling. A postponement in such circumstances would inure to the disadvantage of the appellee who was given no reciprocal option. Further indication that December delivery was of the essence is found in the letter of credit which was provided for in the contract and established by the appellant. Under this letter, the bank was authorized to pay appellee only for deliveries "during December, 1952." It thus appears that the appellant's interpretation of the contract, under which the appellee would be obligated, upon receipt of shipping instructions subsequent to December 17, to deliver in January, would deprive the appellee of the security for payment of the purchase price for which it had contracted.

Since, as we hold, December delivery was of the essence, notice of shipping instructions *on or before December 17* was not merely a "duty" of the appellant—as it concedes: it was a condition precedent to the performance which might be required of the appellee. The nonoccurrence of that condition entitled

the appellee to rescind or to treat its contractual obligations as discharged. Corbin on Contracts, §§640, 724 and 1252; Williston on Sales, §§452, 457; Restatement, Contracts, §262; *National Commodity Corp.* v. *American Fruit Growers*, Super. Ct., Del., 70 A. 2d 28; *Alpena Portland Cement Co.* v. *Backus*, 8 Cir., 156 F. 944; *Jungmann & Co.* v. *Atterbury Bros. Inc.*, 249 N. Y. 119, 163 N. E. 123; *Arnolt Corp.* v. *Stansen Corp.*, 7 Cir., 189 F. 2d 5. On December 18th the appellant unequivocally exercised its right to rescind. Having done so, its obligations as to the Houston deliveries under the contract were at an end. And of course its obligations would not revive thereafter when the appellant finally succeeded in obtaining an export permit, a ship and a dock and then gave shipping instructions; when it expressed willingness to accept deliveries in January; or when it accomplished a "liberalization" of the outstanding letter of credit whereby payments might be made against simple forwarder's receipts instead of dock receipts.*

The appellant urges that by reason of substantial part performance on its part prior to December 17th, it may not be held to have been in default for its failure sooner to give shipping instructions. The contention has no basis on the facts. As to the Houston shipments the appellant's activities prior to December 17th were not in performance of its contract: they were merely preparatory to its expectation to perform at a later time. The mere establish-

* The appellee was not informed that the letter of credit had "liberalized" until after it had rescinded. Moreover, even the liberalized letter did not call for payment of deliveries not made until January.

ment of the letter of credit was not an act of performance: it was merely an arrangement made by the appellant for future performance which as to the Houston deliveries because of appellant's failure to give shipping instructions were never made. From these preparatory activities the appellee had no benefit whatever.

The appellant also maintains that the contract was single and "indivisible" and that consequently appellee's continuing shipments to Lake Charles after December 17 constituted an election to reaffirm its total obligation under the contract. This position also, we hold untenable. Under the contract, the appellee concededly had an option to split the deliveries betwixt Lake Charles and Houston. The price had been fixed on a per pocket basis, and payment under the letter of credit, was to be made upon the presentation of dock receipts which normally would be issued both at Lake Charles or Houston at different times. The fact that there was a world market for rice and tha in December the market price substantially exceede the contract price suggests that it would be more to the appellant's advantage to obtain the Lake Charles delivery than to obtain no delivery at all. The same considerations suggest that by continuing with the Lake Charles delivery the appellee did not deliberately intend to waive its right to cancel the Houston deliveries. Conclusions to the contrary would be so greatly against self-interest as to be completely unrealistic. The only reasonable inference from the totality of the facts is that the duties of the parties as to the Lake Charles shipment

were not at all dependent on the Houston shipments. We conclude their duties as to shipments at each port were paired and reciprocal and that performance by the parties as to Lake Charles did not preclude the appellee's right of cancellation as to Houston. Cf. Corbin on Contracts §§688, 695; *Simms-Wylie Co.* v. *City of Ranger*, 224 S. W. 2d 265.

Finally, we hold that the appellant's claims of estoppel and waiver have no basis in fact or in law.

Affirmed.

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of September, one thousand nine hundred and fifty-eight.

Present: HON. CARROLL C. HINCKS,
HON. J. EDWARD LUMBARD,
HON. STERRY R. WATERMAN,
Circuit Judges.

INTERNATIO-ROTTERDAM, INC.,
Plaintiff-Appellant.

v.

RIVER BRAND RICE MILLS, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Judgment of Court of Appeals

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to appellee.

A. DANIEL FUSARO
Clerk

By JOHN M. DOYLE
Deputy Clerk

Judgment of District Court

DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF NEW YORK

INTERNATIO-ROTTERDAM, INC.,
Plaintiff,

—against—

RIVER BRAND RICE MILLS, INC.,
Defendant.

The plaintiff having appealed to the United States Court of Appeals for the Second Circuit from the judgment entered in this cause which judgment, among other things, awarded judgment in favor of the defendant for costs as taxed at the sum of $669.55, and said appeal having been argued and the United States Court of Appeals for the Second Circuit having rendered its opinion, dated the 12th day of Septem-

ber, 1958 and issued a copy of its judgment filed herein on September 30th, 1958, wherein and whereby it was ordered, adjudged and decreed that the judgment of this Court be affirmed with costs in the sum of $1,253.20 in favor of defendant, and

NOW, THEREFORE, on motion of Ide & Haigney, attorneys for defendant, it is

ORDERED, ADJUDGED AND DECREED that the judgment of the United States Court of Appeals for the Second Circuit be and the same is hereby made the judgment of this Court; and it is further

ORDERED, ADJUDGED AND DECREED that the defendant, River Brand Rice Mills, Inc. recover of the plaintiff, Internatio-Rotterdam, Inc., the sum of $1,253.20 costs as taxed, in the United States Court of Appeals for the Second Circuit, and that the defendant, River Brand Rice Mills, Inc. have judgment therefor.

Dated: New York, New York
October 9, 1958

SYLVESTER J. RYAN
U. S. D. J.

Judgment Entered 10/9 58

HERBERT A. CHARLSON
Clerk